

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of Applications of)
)
FUTURE COMM) File Nos. 0000726942, 0000584833,
) 0000639642, 0000640852,
For Authority to Operate Private Land Mobile Stations) 0000597305, 0000711730
at Various Locations in California)
)
WHEELCARE TRANSPORTATION – Station WPVC521) File No. 0000873738
DUNN’S SAND – Station WPVC522) File No. 0000873739
JACK GRIGG’S INC – Station WPVC777) File No. 0000873740
YELLOW CAB – Station WPVC524) File No. 0000873741
JESSE VELASQUEZ – Station WPVC525) File No. 0000873742
GIST FARMS INC. – Station WPVC519) File No. 0000873746
PHILLIP DEHAAN – Station WPVC533) File No. 0000873748
SLOVER BROTHERS TRUCKING INC. – Station WPVC538) File No. 0000873749
REPLOGLE FARMS – Station WPVC539) File No. 0000873751
GIST TRUCKING – Station WPVC540) File No. 0000873752
SIERRA LIFESTAR AMBULANCE – Station WPVC542) File No. 0000873755
CHUCK BROWN – Station WPVC543) File No. 0000873757
WINDMILL RANCH – Station WPVC544) File No. 0000873758
SIMONICH FARMS – Station WPVC546) File No. 0000873759
LANGE PLUMBING SUPPLY INC. – Station WPVC547) File No. 0000873760
CAL RED PRODUCTS – Station WPVC549) File No. 0000873761
SHOO FLY SPRAYING – Station WPVC551) File No. 0000873762
)
For Authority to Operate Private Land Mobile Stations)
on Frequency 854.9125 MHz at Visalia, California)

MEMORANDUM OPINION AND ORDER AND ORDER ON RECONSIDERATION

Adopted: March 19, 2003

Released: March 21, 2003

By the Chief, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. On March 12, 2002, William Bolthouse Farms, Inc. (“Bolthouse”), George S. Gillam (“Gillam”), and Felder Communications (“Felder”) (collectively, “Complainants”) filed an informal complaint requesting that the Wireless Telecommunications Bureau dismiss six pending applications filed by Future Comm, and direct Future Comm to cease its unlicensed operations at the site of one of its proposed stations.¹ On July 18, 2002, Bolthouse and Felder (collectively, “Petitioners”) filed a petition

¹ Informal Complaint (filed Mar. 12, 2002) (“Informal Complaint”).

for reconsideration² of the grants of licenses to Wheelcare Transportation Station, Dunn's Sand, Jack Grigg's Inc., Yellow Cab, Jesse Velasquez, Gist Farms Inc., Phillip Dehaan, Slover Brothers Trucking Inc., Replogle Farms, Gist Trucking, Sierra Lifestar Ambulance, Chuck Brown, Windmill Ranch, Simonich Farms, Lange Plumbing Supply Inc., Cal Red Products, and Shoo Fly Spraying (collectively, "Seventeen Licensees"). For the reasons stated below, we grant the Informal Complaint in part and dismiss it in part, and we grant the Petition.

II. BACKGROUND

2. Bolthouse is the licensee of conventional Industrial/Land Transportation (I/LT) Station WNPP607, Kern County, California. Gillam is the licensee of conventional I/LT Station WPRL465, Kern County, California. Felder is the licensee of conventional I/LT Station WQA519, Fresno County, California. All three stations operate on frequency pair 809/854.9125 MHz.

3. *Informal Complaint.* Between September 2001 and January 2002, Future Comm filed six applications for authorization to construct and operate trunked 800 MHz I/LT stations at locations in Fresno, Kings, Mariposa, Monterey, San Luis Obispo, Sutter, and Tulare Counties, California.³ One application, FCC File No. 0000726942, was granted on May 8, 2002 under Call Sign WPUI236. The other applications were dismissed between December 2001 and February 2003 because Future Comm had not demonstrated that it was eligible for the number and category of channels requested.⁴

4. On March 12, 2002, Complainants filed the Informal Complaint asserting that they were receiving harmful interference on frequency 854.9125 MHz from an unlicensed radio facility operated by Future Comm at the location of the station proposed in Future Comm's application File No. 0000597305.⁵ They note that no license has been issued for the facility,⁶ and request an order that Future Comm cease all construction and operation of the facility until Future Comm is authorized to operate.⁷ Complainants also question whether any of Future Comm's applications should be granted, in light of Future Comm's

² Petition for Reconsideration (filed July 18, 2002) ("Petition").

³ File No. 0000584833 (filed Sept. 5, 2001); File No. 0000597305 (filed Sept. 19, 2001); File No. 0000639642 (filed Oct. 24, 2001); File No. 0000640852 (filed Oct. 25, 2001); File No. 0000711730 (filed Dec. 26, 2001); File No. 0000726942 (filed Jan. 8, 2002).

⁴ File No. 0000584833 was dismissed on May 15, 2002, on the grounds that Future Comm had presented insufficient justification to authorize the channels requested. *See* Ref. No. 148736 (generated May 16, 2002). The remaining applications were dismissed between December 2001 and February 2003, on the grounds that Future Comm's intended use of the stations was not permitted on I/LT Pool frequencies. *See* Ref. No. 1177867 (generated Dec. 11, 2001) (File No. 0000597305); Ref. No. 1312580 (generated Mar. 1, 2002) (File No. 0000711730); Ref. No. 1342947 (generated Mar. 20, 2002) (File No. 0000640852); Ref. No. 1752656 (generated Feb. 19, 2003) (File No. 0000639642).

⁵ Informal Complaint at 1. Actually, Complainants cite "FCC File No. 507305," but the intended reference appears to be to File No. 0000597305.

⁶ In fact, as noted earlier, the application was dismissed in December 2001. *See supra* note 4.

⁷ Informal Complaint at 1-2.

apparent unwillingness to avoid creating interference.⁸ Complainants also express doubt about Future Comm's eligibility for the frequencies it requested.⁹

5. *Petition for Reconsideration.* On May 2, 2002, the Seventeen Licensees filed applications to use, *inter alia*, frequency 854.9125 MHz on a trunked community repeater at Potato Hill, Tulare County, California. The applications were granted in June 2002.¹⁰

6. On July 18, 2002, Petitioners sought reconsideration of the grants on the grounds that they will receive significant harmful interference from the Seventeen Licensees' stations.¹¹ Petitioners also contend that Future Comm is the real party in interest with respect to the licenses, and reassert the allegations in the Informal Complaint regarding Future Comm's disregard for its obligation to avoid causing interference to other licensees.¹² Petitioners seek cancellation of the Seventeen Licensees' authorization to use frequency 854.9125 MHz.¹³

III. DISCUSSION

7. *Informal Complaint.* As noted above, application File No. 0000726942 was granted on May 8, 2002, but the Informal Complaint against the application was not filed until May 12, 2002. Section 1.106 of the Commission's Rules provides, in relevant part, that a petition for reconsideration shall be filed with the Commission's Secretary within thirty days from the date of public notice of the final Commission action, and served upon parties to the proceeding.¹⁴ Although the Informal Complaint is not labeled as a petition for reconsideration, it complies with the applicable procedural requirements. Accordingly, we will treat the Informal Complaint as a petition for reconsideration of the grant of the application.¹⁵

8. Based upon our review of the record in this proceeding, we conclude that the application should not have been granted. In the application, Future Comm provided the following explanation for its asserted eligibility for I/LT channels: "Applicant is in the business of information collection, relay and

⁸ *Id.* at 2.

⁹ *Id.* at 4-6.

¹⁰ Applications File Nos. 0000873738-42, 0000873748-49, 0000873751-52, 0000873755, and 0000873757-62 were granted on June 18, 2002. Application File No. 0000873746 was granted on June 19, 2002.

¹¹ Petition at 3.

¹² *Id.* at 5-6.

¹³ *Id.* at 7.

¹⁴ 47 C.F.R. § 1.106(f), (i).

¹⁵ See, e.g., Daniel R. Goodman, Receiver; Dr. Robert Chan, *Memorandum Opinion and Order on Reconsideration*, 13 FCC Rcd 21994, 21959 ¶ 24 (1998); Radiowave, *Order on Reconsideration*, 16 FCC Rcd 5300, 5303 ¶ 7 (WTB 2001). Because the other Future Comm applications have been dismissed, the Informal Complaint is moot with respect to those applications.

analysis for growers, packers and truckers. Radio communications shall be used to relay information, coordinate field activities and for safety.”¹⁶ This is very similar to the Activity Description in Future Comm’s other applications,¹⁷ which the Public Safety and Private Wireless Division, Licensing and Technical Analysis Branch correctly concluded did not demonstrate eligibility for I/LT spectrum.¹⁸ We agree with the Complainants that Future Comm appears to intend to provide communications services to third parties.¹⁹ Such services are permitted on 800 MHz I/LT frequencies only on a not-for-profit, cost-shared basis,²⁰ but Future Comm has given no indication that it would provide service on such a basis. We conclude that application File No. 0000726942 should have been dismissed for the same reasons that the other Future Comm applications were dismissed. Consequently, we will set aside the grant, return the application to pending status and then dismiss the application.

9. *Petition for Reconsideration.* Generally, the distance separation requirement between co-channel I/LT stations in the 800 MHz band is 113 km.²¹ We note, as an initial matter, that Potato Hill is more than 113 km from both Stations WNPP607 and WQA519.²² However, for high sites in California north of 35° North latitude and west of 118° West latitude,²³ additional criteria apply. Specifically, Section 90.621(b)(2) of the Commission’s Rules contains a table of high sites in that part of California, and indicates which sites cannot have co-channel stations.²⁴ Because Potato Hill is not listed in the table, the required co-channel separations must be determined on a case-by-case-basis, taking into consideration

¹⁶ FCC File No. 0000726942, Schedule H, Item 2.

¹⁷ See FCC File No. 0000584833, Schedule H, Item 2 (“Applicant is engaged in the business of information collection and analysis. Radio communication is to be used to coordinate [sic] field activities, relay information and for safety.”); FCC File No. 0000597305, Schedule H, Item 2 (“Applicant is engaged in the business of information collection and analysis and shall providing [sic] communication to agricultural packing and transport businesses. Radio communications to be used to coordinate field activities and for safety.”); FCC File No. 0000639642, Schedule H, Item 2 (“Applicant is engaged in the business of information collection and analysis. Radio communication will be used to relay information, coordinate field activities and for safety.”); FCC File No. 0000640852, Schedule H, Item 2 (“Applicant is engaged in the business of information collection and distribution to transport businesses. Radio communications to be used to coordinate field activities and for safety.”); FCC File No. 0000711730, Schedule H, Item 2 (“Applicant is engaged in the business of information collection, relay and analysis for other businesses, growers, packers and shippers. Radio communication will be used to relay information, coordinate field activities and for safety.”).

¹⁸ See *supra* note 4.

¹⁹ Informal Complaint at 5.

²⁰ 47 C.F.R. § 90.603(b).

²¹ See 47 C.F.R. § 90.621(b).

²² Potato Hill is approximately 160.8 km from Station WNPP607 and 130.9 km from Station WQA519. Petition at 2-3.

²³ Each of the applications of the Seventeen Licensees lists the coordinates as 36-19-12.0 N/118-56-39.0 W. Station WNPP607’s transmitters are located at 35-55-10.9 N/119-24-19.4 W (Pelato Peak) and 35-02-44.9 N/118-27-38.3 W (Observatory Ridge). Station WQA519’s transmitter is located at 36-18-4.8 N/120-24-5.6 W (Joaquin Ridge).

²⁴ See 47 C.F.R. § 90.621(b)(2).

parameters such as antenna height, effective radiated power, terrain irregularities, and market conditions.²⁵

10. Petitioners argue that the Potato Hill transmitter is on a very high site that allows for free-space transmission in the San Joaquin Valley, including direct line-of-sight to Petitioners' stations.²⁶ In support, Petitioners have submitted engineering statements²⁷ demonstrating that the Seventeen Licensees' operations will cause interference to Petitioners' stations.²⁸

11. In opposition to the Petition,²⁹ the Seventeen Licensees argue that their licenses are proper because the distance separation to the Petitioners' stations is consistent with the separations permitted by the short-spacing table in Section 90.621(b)(4).³⁰ We agree with Petitioners that the present matter is governed by Section 90.621(b)(2), rather than Section 90.621(b)(4).³¹ Indeed, the short-spacing table specifically notes that Section 90.621(b)(2) requires greater distance separations for high sites in California, and provides that Section 90.621(b)(2) governs in the event of a conflict.³²

12. We also agree with Petitioners that the Seventeen Licensees should not have been authorized to operate on frequency 854.9125 MHz at Potato Hill. We have conducted our own engineering analysis, which confirms the conclusions in Petitioners' engineering statements that facilities operating at Potato Hill would cause harmful interference³³ to the Petitioners' stations, particularly Station

²⁵ See 47 C.F.R. § 90.621(b)(2)(ii).

²⁶ Petition at 3.

²⁷ 47 C.F.R. § 1.106(e) provides that:

Where a petition for reconsideration is based upon a claim of electrical interference, under appropriate rules in this chapter, to an existing station or a station for which a construction permit is outstanding, such petition, in addition to meeting the other requirements of this section, must be accompanied by an affidavit of a qualified radio engineer. Such affidavit shall show, either by following the procedures set forth in this chapter for determining interference in the absences of measurements, or by actual measurements made in accordance with the methods prescribed in this chapter, that electrical interference will be caused to the station within its normally protected contour.

²⁸ See Statement of Mel Freedman ("Freedman"), Engineer for Felder (dated July 12, 2002), attached as Exhibit A; and Statement of Mel Freedman, Engineer for Bolthouse (dated July 12, 2002), attached as Exhibit B.

²⁹ Opposition of Petition for Reconsideration at 2-3 (filed Aug. 6, 2002) ("Opposition"). We agree with Petitioners that the Opposition was untimely filed. See Reply to Opposition of Petition for Reconsideration at 2 (filed Aug. 16, 2002) ("Reply") (citing 47 C.F.R. § 1.106(g)). However, to ensure a complete record before us, we will consider the Opposition and arguments therein. Nonetheless, we take this opportunity to remind parties having business before the Commission that adherence to the filing requirements specified in Commission's rules is expected and that non-adherence could result in dismissal of responsive pleadings.

³⁰ Opposition at 2-3 (citing 47 C.F.R. § 90.621(b)(4)).

³¹ See Reply at 4.

³² See 47 C.F.R. § 90.621(b)(4) note 1.

³³ Our rules define "harmful interference" as, "any emission, radiation, or induction which specifically degrades, obstructs, or interrupts the service provided by such stations." 47 C.F.R. § 90.7.

WQA519. In addition, we note that the site of Station WQA519 (Joaquin Ridge) is listed in the table in Section 90.621(b), and that the table prohibits authorization of a co-channel station at Blue Ridge, which is the closest site on the table to Potato Hill (and in fact is farther from Joaquin Ridge than Potato Hill is).³⁴ Thus, the conclusions of the engineering studies are consistent with the table. Consequently, we will set aside the grant of the licenses of the Seventeen Licensees with respect to frequency 854.9125 MHz.³⁵

IV. CONCLUSION

13. We grant the Informal Complaint to the extent that we shall set aside the grant to Future Comm of the license to operate Station WPUI236. In other respects, the Informal Complaint is moot, because the other applications at issue already have been dismissed. We also grant the Petition, and shall set aside the authorizations of the Seventeen Licensees to operate at Potato Hill on frequency 854.9125 MHz.

V. ORDERING CLAUSES

14. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 309, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309, 405, and Sections 1.41 and 1.106 of the Commission's Rules, 47 C.F.R. §§ 1.41, 1.106, that the Informal Complaint filed by William Bolthouse Farms, Inc., George S. Gillam, and Felder Communications on March 12, 2002 IS GRANTED IN PART and DISMISSED AS MOOT IN PART to the extent indicated herein.

15. IT IS FURTHER ORDERED that the grant of the license for Station WPUI236 IS SET ASIDE, and application FCC File No. 0000726942, filed by Future Comm on January 8, 2002, SHALL BE DISMISSED.

16. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 405, and Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, that the Petition for Reconsideration filed by William Bolthouse Farms, Inc., and Felder Communications on July 18, 2002 IS GRANTED.

17. IT IS FURTHER ORDERED that the grants of the licenses for Station WPVC521, Station WPVC522, Station WPVC777, Station WPVC524, Station WPVC525, Station WPVC519, Station WPVC533, Station WPVC538, Station WPVC539, Station WPVC540, Station WPVC542, Station WPVC543, Station WPVC544, Station WPVC546, Station WPVC547, Station WPVC549, and Station WPVC551 ARE SET ASIDE in part, and the licenses SHALL BE MODIFIED by removing frequency 854.9125 MHz.

³⁴ See 47 C.F.R. § 90.621(b). Potato Hill is approximately 10.2 km from Blue Ridge, and is closer to Joaquin Ridge by approximately 9.4 km.

³⁵ Because we agree with Petitioners on the interference issue, we need not address Petitioners' other allegations, which the Seventeen Licensees dispute. See Opposition at 4.

18. This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

D'wana R. Terry
Chief, Public Safety and Private Wireless Division
Wireless Telecommunications Bureau